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Supreme Court, U.S.
FILED
AUG 27 1996
CLERK

No. 96-28

In The

Supreme Court of the United States

October Term, 1995

JAMES N. RIVERS,

Petitioner,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is there anything requiring this Court's review of the appellate court's ruling that Petitioner failed to raise a genuine issue of material fact under 42 U.S.C. § 2000e-2(a) that Respondent's reasons for promoting a white male over him were pretextual?

RULE 29.6 DISCLOSURE STATEMENT

In conformance with Supreme Court Rule 29.6, here follows a list of subsidiaries that are not wholly-owned by their parent, Federal Express Corporation:

Subsidiary	Ownership	% of Ownership
Decom Freight Holdings Limited	Decom Investments Limited	54%
	Federal Express International, Inc.	46%
Federal Express (Antilles Francaises) S.A.R.L.	Federal Express Holdings, S.A.	98%
	Other*	2%
Federal Express (Bahamas) Limited	Federal Express Holdings, S.A.	40%
	Other*	60%
Federal Express (Bermuda) Limited	Federal Express Holdings, S.A.	40%
	Other*	60%
Federal Express Cayman Limited	Federal Express Holdings, S.A.	40%
	Other*	60%
Federal Express Entregas Rapidas, Ltd.	Federal Express Holdings, S.A.	99.9988%
	Federal Express International, Inc.	0.0012%

* Indicates ownership other than by direct or indirect subsidiary of Federal Express Corporation.

Subsidiary	Ownership	% of Ownership
Federal Express Europe, Inc. & Co. V.O.F./S.N.C.	Federal Express Europe, Inc.	95%
	FEDEX Partners, Inc.	5%
Federal Express Holdings (Mexico) y Compania S.N.C. de C.V.	Federal Express Holdings, S.A.	95%
	Federal Express International, Inc.	5%
Federal Express International (France) SNC	Federal Express International, Inc.	95%
	Federal Express Corporation	5%
Federal Express International Y Compania S.N.C. de CV	Federal Express International, Inc.	95%
	Federal Express Holdings, S.A.	5%
Federal Express Services (M) Sdn. Bhd.	Federal Express Pacific, Inc.	51%
	Other*	49%
Federal Express (St. Kitts) Limited	Federal Express Holdings, S.A.	99.9%
	Other*	.1%
Federal Express (Thailand) Limited	Federal Express International, Inc.	40.9%
	Other*	59.1%

Subsidiary	Ownership	% of Ownership
PIK Holdings Limited	Federal Express Europe, Inc.	8.28%
	Other*	91.72%
The Flying Tiger Line, Limited	Federal Express Pacific, Inc.	50%
	Federal Express International, Inc.	50%
Udara Express Courier Services Sdn. Bhd.	Federal Express Pacific, Inc.	47%
	Other*	53%

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OPINIONS BELOW

The United States District Court for the Western District of Tennessee, Western Division, rendered its Order Granting Defendant's Second Motion For Summary Judgment in this case, Case No. 93-3023-G ("Summary Judgment Order"), on January 18, 1995. (Attached as Appendix A). The Summary Judgment Order, entered on the docket sheet on January 20, 1995, is not officially reported. The United States Court of Appeals for the Sixth Circuit filed its Order in this case ("Order") on February 2, 1996. (Attached as Appendix B). Pursuant to Sixth Circuit Rule 24, the Order was not recommended for full-text publication.

STATUTE INVOLVED

42 U.S.C. § 2000e-2:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer __
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect

his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

In his Complaint, filed in the District Court for the Western District of Tennessee, Western Division,[1] Petitioner, an African-American, claimed that Respondent's choice of a white male, Tim Breen, rather than him for promotion to full-time Control Room Agent in Respondent's Oakland, California office constituted unlawful discrimination under Title VII, 42 U.S.C. § 2000e-2(a). The case developed as follows.

A. The Petitioner's Phone Conversation With Manager Thompson.

In June, 1991, Marguerite Thompson, an African-American Operations Manager at the Oakland facility, talked with Petitioner over the phone about the Control Room Agent position. (Affidavit of Marguerite Thompson attached as Exhibit C to Federal Express' Second Motion For Summary Judgment ("Thompson Affidavit"), ¶¶ 2, 3). Thompson noted that during her initial phone conversation with Petitioner, he acknowledged that he had delayed in sending in his supplemental application packet (*id.* ¶ 7) and discussed at length the significantly higher cost-of-living in Oakland in comparison to Memphis. (*id.* ¶ 6). Although Petitioner claims that during this phone conversation Thompson offered him the job (*see* Petition For Writ Of Certiorari ("Petition"), p. 3), Thompson recalled that she did not and that she informed Petitioner that an in-person interview would take place later. (Thompson Affidavit, ¶ 9). Thompson

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1. Jurisdiction in the district court was based upon 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343 (4).

stated that the most important factor in filling such positions is the interview process itself, which includes the supplemental application packet. (*Id.* ¶ 10). In fact, a formal interview was a required procedure for "leadership and technical" positions like Control Room Agent. (Affidavit of Mike Meyer, attached as Exhibit E to Federal Express' Second Motion For Summary Judgment ("Meyer Affidavit), ¶ 4; Affidavit of Ken Allison, attached as Exhibit D to Federal Express' Second Motion For Summary Judgment ("Allison Affidavit"), ¶ 5). EEOC investigative notes include the notation: "[Thompson] said 'he [Petitioner] could not have interpreted [the conversation] as having a lock on the job' she explicitly told him there were other candidates. She told him 'you should come out here and see how different the work is out here.' " (*See* Plaintiff's Summary Judgment Response, Exhibit A).

B. The Delay In The Interviewing Process.

Before she had the opportunity to interview candidates for the Control Room Agent position, Ms. Thompson transferred to another manager position at the Oakland Hub. (Thompson Affidavit ¶ 11). Her replacement, Ken Allison, and Allison's Senior Manager, Mike Meyer, assumed the responsibility for filling the Control Room Agent position. (Meyer Affidavit, ¶ 3; Allison Affidavit, ¶ 3). Meyer wished to be involved in the hiring process for this critical position at the Oakland Hub operation, so the selection process was delayed while Meyer underwent hip replacement surgery. (Meyer Affidavit, ¶ 3; Allison Affidavit, ¶ 3).

In November, 1991, Allison asked Petitioner if he were still interested in the position, and if so, when he could come to Oakland to interview (Pl. Dep. Ex. 3); in his deposition, Petitioner noted that there were "several correspondences sent

back and forth." (Pl. Dep., Tr. 156).[2] Petitioner was interviewed on February 4, 1992 by Allison and Meyer, and on February 28, 1992, Petitioner was notified that Tim Breen had been selected to fill the position. (Petition, p. 4). Later in 1992, Petitioner received a promotion to full-time Control Room Agent position in Federal Express' Memphis, Tennessee facility, a position similar to the Oakland job. (Pl. Dep. Tr. 223-24, 227).

C. Petitioner's Evidence Of Discrimination.

In his deposition, Petitioner claimed discrimination solely in the selection process and testified that it was Meyer and Allison who discriminated against him. (Pl. Dep. Tr. 255-257).[3] Petitioner admitted, however, that during the telephone conversations and interview process with the Oakland managers nothing was said that made him feel there was any racial bias with respect to the selection process, and Petitioner acknowledged that he never heard them make, or heard that they had ever made, racially derogatory statements. (*Id.* 178, 255). And although Petitioner did not think that Meyer's absence should have caused the delay, Petitioner could not point to anything racial in the delay. (*Id.* 161-62).

The district court noted that Petitioner offered two bases for his claim that Respondent's failure to select him was discriminatory: (1) Petitioner's claim that he met or exceeded all requirements for the position and was ranked "as the #1 job

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2. The cited pages of Petitioner's deposition transcript appear in Exhibit A to Federal Express' Second Motion For Summary Judgment, Docket No. 30; Citations to exhibits to Petitioner's deposition appear in Exhibit B to the Second Motion For Summary Judgment.

3. The district court noted that Petitioner did not pursue in that court his EEOC charge that he was denied promotion in retaliation for a previous internal EEO complaint. (Summary Judgment Order at 2a, n. 2).

applicant for the position on defendant's computerized ranking system" and (2) Petitioner's claim that Managers Ken Allison and Mike Meyer used a "hostile interview style." (Summary Judgment Order at 5a-6a). Concerning each of these, the record demonstrates the following.

D. The Computer Ranking Evidence.

At his deposition, Petitioner admitted that under Federal Express' policy, management is prohibited from looking exclusively at the computerized ranking system ("CEV rankings") when selecting personnel for technical and leadership positions like the one Petitioner wanted. (Pl. Dep. Tr. 198). In fact, Federal Express policy provides that for jobs such as the full-time Control Room Agent, the CEV rankings are used solely to determine which Federal Express employees *are to be interviewed*. (Meyer Affidavit, ¶ 4; Allison Affidavit, ¶ 5; *see* Summary Judgment Order at 5a).

E. The "Hostile Interview" Evidence.

Petitioner was unable to specify how Meyer's and Allison's interview techniques were improper (Pl. Dep. Tr. 167) and furnished no evidence indicating that the "negative questioning" and "tone" Petitioner ascribed to them expressed a racial hostility. (*See* Summary Judgment Order at 6a).

Allison and Meyer stated that they were simply attempting —as they had done with other employees — to ensure that Petitioner was truly committed to moving to California where the cost-of-living is so much higher than in Memphis. (Meyer Affidavit, ¶ 12; Allison Affidavit, ¶ 9).[4]

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4. On several occasions, other transferees from Memphis have requested immediate emergency transfers back to Memphis upon their experiencing the Bay area's high cost of living. (Meyer Affidavit, ¶ 12; Allison Affidavit, ¶ 9).

The district court, *citing Mesnick v. General Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2965 (1992), noted that "[c]ourts may not sit as super personnel departments, assessing the merits — or even the rationality — of employers' nondiscriminatory business decisions" and held that the undisputed evidence could not support a conclusion that Respondent refused to promote Petitioner on account of his race.

The appellate court found that Tim Breen surpassed Petitioner in three important areas, familiarity with the job; a better evaluation record; and greater commitment and enthusiasm about the job (Order at 10a) and held: "The critical question in this case is whether the selection criteria were applied to applicants in a discriminatory manner. There was an utter absence of evidence of racial animus in this case." (*Id.*). The record contains the following support for these findings:

1. In Memphis, the size of the operation resulted in Hub Control Agents being responsible only for a small portion of the operation. By contrast, in Oakland, a Hub Control Agent is responsible for the entire operation. Consequently, Breen, who —was already working essentially the same job at the Oakland hub on a part-time basis — had a greater familiarity with its operations than Petitioner did. For example, Breen had experience with all the computer functions necessary to the Oakland job, while Petitioner had only a limited knowledge of certain of them. (Meyer Affidavit, ¶ 7; Allison Affidavit, ¶ 6). In addition, although Petitioner was also working as a part-time Control Room Agent, Breen had held the position a month longer than Petitioner. (Meyer Affidavit, ¶ 7).

2. Breen had consistently better periodic evaluations than Petitioner as well as a one-month positional seniority over Petitioner. (Pl. Dep. Tr. 190; Pl. Dep. Ex. 17).

3. Breen excelled during the interview process, demonstrating a thorough working knowledge of the Control Room Agent responsibilities and the Oakland operation, as well as a great deal of enthusiasm for the position, both in his supplemental application paperwork and during the interview itself. (Meyer Affidavit, ¶¶ 8-9; Allison Affidavit, ¶ 6). By contrast, Petitioner failed to return his supplemental application packet to Ms. Thompson by the deadline she requested (Thompson Affidavit, ¶ 5), and in his deposition Petitioner confirmed the interviewing managers' impressions that his interest in moving to Oakland resulted largely from his desire to attend flight dispatch school there. (Meyer Affidavit, ¶ 10; Allison Affidavit, ¶ 6; Pl. Dep. Tr. 157-58). Breen's supplemental application was much more thorough and detailed than Petitioner's. (Allison Affidavit, ¶ 6). The most important criterion in selecting individuals to fill positions like Control Room Agent is the interview process itself, which includes the candidate's submission of a detailed supplemental application. (Meyer Affidavit, ¶ 4; Allison Affidavit, ¶ 5).

F. The EEOC Determination Concerning Petitioner's Charge.

On August 16, 1993, the Memphis Equal Employment Opportunity Commission issued a "no cause" determination, having concluded that the better-qualified candidate was selected for the position. (The Memphis EEOC Determination is attached as Appendix C).

REASONS FOR DENYING THE WRIT

THE DISTRICT COURT'S AND THE SIXTH CIRCUIT'S HOLDINGS THAT PETITIONER FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT REGARDING PRETEXT RESULTED FROM A ROUTINE AND FAIR GRANT AND REVIEW OF SUMMARY JUDGMENT.

None of Supreme Court Rule 10(a)'s reasons for granting certiorari applies to this essentially factual case. The record amply supports the district court's and the appellate court's findings that there is no genuine issue of material fact regarding Petitioner's claim of pretext and the appellate court's routine and fair application of settled law to the established facts is neither in conflict with a decision of another United States Court of Appeals nor in need of an exercise of this Court's supervisory power. Indeed, Petitioner's vague claims of incorrect standards cannot disguise the fact that his claims constitute just the kind of assertions of erroneous factual findings and misapplication of a properly stated rule of law of which Rule 10 is so chary.

Since Petitioner produced no direct evidence of racial animus — and even acknowledged the complete absence of any expressions of it — he had to fulfill the shifting burdens proof of discrimination set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Given the record in this case, there is nothing unusual or aberrant about the Sixth Circuit's holding that "when it was his burden to do so, Rivers failed to raise a genuine issue of material fact that the defendant's reasons for selecting Breen over him were pretextual. *See St. Mary's Honor Ctr.*, 113 S. Ct. at 2747-50; *Burdine*, 450 U.S. at 254-56." (Order at 10a).

The facts of Tim Breen's superior qualifications for the Oakland Control Room Agent job were well-established: It is undisputed that Breen had learned a broader range of functions, among which were computer functions necessary to the Oakland position which Petitioner did not know.[5] Furthermore, during the crucial interview process, Breen was much more knowledgeable and enthusiastic about the Oakland job than Petitioner was. In fact, Petitioner confirmed the impression of interviewing managers Allison and Meyer that he was applying for the Oakland job so that he could take night courses to be an air traffic dispatcher. Finally, Breen had consistently better periodic evaluations than Petitioner.

The record shows that Petitioner failed even his prima facie burden because he did not, and could not, show that his qualifications were similar to Breen's. *See Brown v. State of Tennessee*, 693 F.2d 600, 603 (6th Cir. 1982). The district and appellate courts, however, rested their decisions on Petitioner's complete failure to create any genuine issue of material fact that Respondent's reasons for choosing Breen were pretextual. The district court's and the Sixth Circuit's conclusions that Respondent met its burden of articulating legitimate, nondiscriminatory reasons for Breen's promotion were utterly routine and unassailable. The courts below were similarly correct in finding that Petitioner failed to raise a genuine issue of material fact that Respondents' reasons were pretextual.

Although at one point in his deposition Petitioner claimed

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5. Petitioner's assertion that Respondent "claims that experience acquired in the Oakland Hub is more valuable than that gained in Memphis" (Petition, p. 9) fails to recognize the importance of Breen's specific knowledge of all aspects of the Oakland operation. Shortly after Breen's promotion in Oakland, Petitioner himself was chosen from 65 applicants to receive a promotion to full-time Control Room Agent at the Memphis Hub where he already worked part-time. (Pl. Dep. Ex. 17).

discrimination only in the selection process and that it was Meyer and Allison who discriminated against him, Petitioner makes several additional claims. The following brief review demonstrates that all of Petitioner's claims are unfounded.

(1) Petitioner's claim that Thompson offered him the job over the telephone (Petition, p. 3) ignores the facts that (a) Thompson, who herself was African-American, denied this and stated that she informed him that he would have to come out for an interview. The interview (which included the supplemental application) was the most important criterion in filling the job; (b) Petitioner imputed to Thompson, a fellow African-American, no racial motivation whatsoever; and (c) under Federal Express policy, Petitioner could not have been offered the job without the obligatory personal interview.

(2) Petitioner's claim that he was told that he would have to start the Oakland job at less than maximum pay, while Breen was given maximum pay (Petition, pp. 13, 17-18) has no basis in the evidence. In fact, Breen's salary remained the same as what he had been making part-time in the position. (Exhibit V to Plaintiff's Summary Judgment Response).

(3) Petitioner's claim that Breen was treated better because he was required to make a 12-month commitment to the job while Petitioner was informed he would have to make an 18-month commitment if he got the job (Petition, pp. 13, 17-18) ignores the fact that Federal Express policy permits management to require a time commitment of up to 18 months from persons transferring within the same department/station or to a new department/station. The policy stated that the time commitment "may be required when the duties and responsibilities are sufficiently complex or difficult and training time is required for the individual to become productive in the new position . . ." (*See* Exhibit F to Defendant's Summary Judgment Reply). Since

Breen had already performed the same job on a part-time basis in the Oakland Hub and knew computer functions which Petitioner did not, nothing discriminatory can be inferred from a difference in commitment times stated by different managers seven months apart.

(4) Petitioner's statement that Respondent invalidly "attempted to rely on the fact that Breen was in the department longer than [Petitioner] by 19 days" (Petition, pp. 14-15, 17) ignores the fact that Respondent's decision was based not upon an arbitrary seniority but upon Breen's superior qualifications for, and familiarity with the Oakland job.

(5) Petitioner's reliance upon his greater number of CEV points and his assertion that Respondent attempted to mislead the district court to believe that Breen's evaluations were higher (Petition, pp. 15-16), ignores the facts that (a) under Federal Express policy, CEV points were used solely to determine which employees should be interviewed for a job and (b) it was undisputed that Breen's periodic evaluations were consistently superior to Petitioner's.

(6) Petitioner's claim that the interview process was "hostile" (Petition, pp. 13-14) appears to be built on his complaints about Meyer's and Allison's "tone" and his characterization of their questions about his commitment to the Oakland job as being "negative." This claim ignores the fact that Ms. Thompson, an African-American, as well as Messrs. Meyer and Allison questioned Petitioner about his commitment to the Oakland position because of the purely economic differences between living in California and living in Memphis, Tennessee. In fact, virtually all managers in California employ this same technique for out-of-state candidates to ensure that they have a realistic appreciation for the economic forces of moving to California. (*See* Meyer Affidavit, ¶ 12; Allison Affidavit, ¶ 9).

Furthermore, as the district court held, even if Meyer and Allison were hostile, "plaintiff does not offer any evidence indicating that they were hostile to plaintiff on account of his race. Therefore, even if plaintiff could show that the reasons offered by defendant are not legitimate, plaintiff fails to establish the necessary causal connection between discrimination and defendant's failure to promote. *See St. Mary's*, 113 S. Ct. at 2749." (Summary Judgment Order at 6a).

Under these circumstances, the district court's grant of summary judgment under the tenets of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), and the Sixth Circuit's affirmance on the ground that Petitioner failed his burden to proffer some evidence of pretext were both appropriate and routine.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION ENTERED JANUARY 20, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 93-3023-G

JAMES N. RIVERS,

Plaintiff,

vs.

FEDERAL EXPRESS CORP.,

Defendant.

ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

Before the court is the motion of defendant, Federal Express Corp., for summary judgment.[1] Plaintiff brought this action pursuant to 42 U.S.C. § 2000e *et seq.* for alleged racial discrimination in the denial of a promotion. For the following reasons, defendant's motion is granted.

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1. This is defendant's second motion for summary judgment. Defendant's first motion, which the court denied on October 31, 1994, sought summary judgment solely on the grounds that plaintiff's complaint was untimely.

Appendix A

Plaintiff, a black male, was hired by defendant, Federal Express, in November, 1981. In May, 1990, plaintiff was promoted to part-time control room agent at defendant's Memphis hub. Plaintiff's duties included monitoring inbound and outbound aircraft and trucks and acting as liaison for the night sort operations. In June, 1991, plaintiff applied for a full-time position as a control room agent at defendant's Oakland, California hub. Plaintiff met or exceeded all requirements for the position and was ranked first out of all applicants in CEV points. CEV points are points reflected on a computer-generated list that considered company seniority and an individual's most recent evaluations. After receiving plaintiff's application, Marguerite Thompson, an operations manager in Oakland, conducted a telephone interview with plaintiff. Thompson is a black female. When Thompson was transferred, Kenneth Allison, Thompson's replacement, and Michael Meyer, a senior manager, both white males, assumed responsibility for filling the position. Plaintiff interviewed with Meyer and Allison in Oakland on February 4, 1992. The only other candidate interviewed was Tim Breen, a part-time control room agent in Oakland. On February 28, 1992, plaintiff was notified that Breen was selected for the job.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on March 31, 1992, contending that defendant's failure to select him for the position was a result of race discrimination.[2] On August 16, 1993, the EEOC issued a "no cause" determination. Plaintiff filed the present suit on November 24, 1993.

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2. In his EEOC charge, plaintiff also alleged that he was denied the promotion in retaliation for a previous internal EEO complaint he filed against his manager, James McGoff. Plaintiff does not pursue this claim in the present suit.

Appendix A

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

When confronted with a properly-supported motion for summary judgment, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party opposing the motion must "do more than simply show that there is some meta-physical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In short, the non-moving party may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

To survive a motion for summary judgment on a Title VII claim, plaintiff must prove a *prima facie* case of discrimination by a preponderance of the evidence. *Wilson v. Stroh Cos.*, 952 F.2d 942, 945 (6th Cir. 1992) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). If plaintiff succeeds, the burden of production shifts to defendant to articulate a legitimate, non-discriminatory reason for its action. *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 279 (6th Cir. 1991)

(citing *Burdine*, 450 U.S. at 253), *cert. denied*, 112 S. Ct. 1497 (1992). If defendant offers such a reason, the burden shifts back to plaintiff, who must show by a preponderance that defendant's proffered reasons are a pretext for discrimination. *St. Mary's Honor Ctr. v. Hicks*, __ U.S. __, 113 S. Ct. 2742, 2752 (1993).

To establish a *prima facie* case, plaintiff must show that (1) he belongs to a protected group; (2) he applied for and was qualified for the promotion; (3) he was considered for and denied the promotion; and (4) a similarly qualified employee who was not a member of a protected group was promoted at time plaintiff's request was denied. *Brown v. Tennessee*, 693 F.2d 600, 603 (6th Cir. 1982).

It is undisputed that plaintiff satisfies the first three elements of the *prima facie* case. Defendant argues that the fourth element is not satisfied because Breen's qualifications are not similar to plaintiff's. The court need not resolve this issue, however, because even assuming that plaintiff states a *prima facie* case of discrimination, defendant has articulated legitimate, non-discriminatory reasons for selecting Breen over plaintiff.

Although Breen was a part-time control room agent, like plaintiff, Breen had held this position for one month longer than plaintiff. In addition, defendant claims that experience acquired in the Oakland hub is more valuable than that gained in Memphis because, due to a size difference between the hubs, control room agents in Oakland are given broader responsibilities. (Meyer Aff. ¶ 7). Moreover, because Breen was already working at the Oakland location, he had a greater familiarity with its operation, particularly certain computer systems functions. (Allison Aff. ¶ 6). Also, it is undisputed that Breen's periodic evaluations were more favorable than plaintiff's. (Rivers Dep. at 190). Finally, Meyer and Allison each contend that Breen displayed greater

commitment and enthusiasm in the interview and throughout the selection process. Their impression was that plaintiff sought the position not for the job itself, but because he wanted to attend a flight dispatch school in Oakland. (Meyer Aff. ¶ 10; Allison Aff. ¶ 6).

Courts have consistently held that "so long as its reasons are not discriminatory, an employer is free to choose among qualified candidates" for a position. *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir. 1987). *See also Mesnick v. General Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991) ("Courts may not sit as super personnel departments, assessing the merits-or even the rationality-of employers' nondiscriminatory business decisions."), *cert. denied*, 112 S. Ct. 2965 (1992). The reasons offered by defendant for not selecting plaintiff are legitimate and non-discriminatory. The burden thus shifts to plaintiff to establish that defendant's reasons for selecting Breen are pretextual.

A plaintiff may show pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Plaintiff offers two bases for his contention that defendant's failure to select him was discriminatory. First, plaintiff notes that his CEV points were the highest of all the applicants for the position, and he therefore should have received the promotion. It is undisputed, however, that for technical and leadership positions, such as the control room agent position sought by plaintiff, company policy dictates that CEV point rankings be used only to determine which candidates are interviewed. (Thompson Aff. ¶ 10; Meyer Aff. ¶ 4; Allison Aff. ¶ 5). In fact, company policy expressly prohibits management from considering only CEV points when selecting a candidate for such a position. (Def. Ex. B; Rivers Dep. at 198).

Second, plaintiff contends that Meyer and Allison conducted his interview in a hostile manner. Specifically, plaintiff claims they asked him "negative questions" and did not employ proper interview techniques. (Rivers Dep. at 162-67). Meyer and Allison claim they were attempting to ascertain plaintiff's commitment to the job and to the Oakland area. Specifically, they mention their concern that plaintiff appreciate the economic impact of moving to Oakland from Memphis.

Even if the court accepted plaintiff's contention that Meyer and Allison were "hostile" in the interview, plaintiff does not offer any evidence indicating that they were hostile to plaintiff on account of his race. Therefore, even if plaintiff could show that the reasons offered by defendant are not legitimate, plaintiff fails to establish the necessary causal connection between discrimination and defendant's failure to promote. *See St. Mary's*, 113 S. Ct. at 2749. Plaintiff offers no evidence indicating that Meyer and Allison considered plaintiff's race a factor in selecting a candidate for the promotion. Mere conclusory assertions of discrimination are not sufficient to withstand a motion for summary judgment. *Patterson v. General Motors Corp.*, 631 F.2d 476, 482 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981).

The undisputed evidence cannot support a conclusion that defendant refused to promote plaintiff on account of his race. Accordingly, defendant's motion for summary judgment is granted.[3]

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3. Defendant also moves to strike plaintiff's demand for a jury trial. Because the court is granting defendant's motion for summary judgment, the motion to strike is moot and need not be considered by the court.

IT IS SO ORDERED.

s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

January 18, 1995
DATE

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED FEBRUARY 2, 1996

NO. 95-5255

UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

JAMES N. RIVERS,

Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,

Defendant-Appellee.

ORDER

BEFORE: NORRIS and MOORE, Circuit Judges; and MILES, District Judge.*

James N. Rivers appeals a district court judgment granting summary judgment in favor of the defendant in this action brought pursuant to 42 U.S.C. §§ 2000e, et seq. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Rivers, a black male, was hired by the defendant, Federal Express Corporation, in November 1981. In May 1990, Rivers was promoted to part-time control room agent at the defendant's

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* The Honorable Wendell A. Miles, United States District Judge for the Western District of Michigan, sitting by designation.

Memphis, Tennessee hub. Rivers's duties included monitoring inbound and outbound aircraft and trucks and acting as liaison for the night sort operations. In June 1991, Rivers applied for a full-time position as a control room agent at the defendant's Oakland, California hub. Rivers met or exceeded all requirements for the position and was ranked first out of all applicants in CEV points. CEV points are points reflected on a computer-generated list that considered company seniority and an individual's most recent evaluations. Rivers interviewed for the position on February 4, 1992. The only other candidate interviewed was Tim Breen, a part-time control room agent in Oakland. On February 28, 1992, Rivers was notified that Breen was selected for the job.

Rivers filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on March 31, 1992, contending that the defendant's failure to select him for the position was a result of race discrimination. On August 16, 1993, the EEOC issued a "no cause" determination. Rivers filed the present action on November 24, 1993, alleging racial discrimination in the denial of a promotion.

The defendant flied a motion for summary judgment solely on the grounds that Rivers's complaint was untimely. The district court denied this motion on October 31, 1994. The defendant filed a second motion for summary judgment on the merits of the discrimination claim. The district court granted the motion for summary judgment in an order entered January 20, 1995. This timely appeal followed.

Upon review, we conclude that the district court properly granted summary judgment to the defendant as there is no genuine issue as to any material fact and the defendant is entitled

to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994). Rivers is not entitled to relief because he did not meet his burden of proving employment discrimination as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Even if it is assumed that Rivers established a prima facie case of discrimination, the defendant met its burden of articulating legitimate, nondiscriminatory reasons by stating that it selected Breen over Rivers because Breen was already working at the Oakland hub, had a greater familiarity with its operations, had more favorable evaluations than Rivers, and displayed greater commitment and enthusiasm in the interview and throughout the selection process. *See St. Mary's Honor Ctr. v. Hicks,* 113 S. Ct. 2742, 2747-50 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). Ultimately, however, when it was his burden to do so, Rivers failed to raise a genuine issue of material fact that the defendant's reasons for selecting Breen over him were pretextual. *See St. Mary's Honor Ctr.*, 113 S. Ct. at 2747-50; *Burdine*, 450 U.S. at 254-56.

In his brief on appeal, Rivers advances new arguments as grounds for finding a pretext of racial discrimination. Unless exceptional circumstances are present, the court normally will not address an issue not first raised in the district court. *See Foster v. Barilow,* 6 F.3d 405, 407 (6th Cir. 1993). No exceptional circumstances warrant addressing these arguments now. The critical question in this case is whether the selection criteria were applied to applicants in a discriminatory manner. There was an utter absence of evidence of a racial animus in this case.

Appendix B

Accordingly, the district court's order is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX C — EEOC DETERMINATION LETTER DATED AUGUST 16, 1993

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Memphis District Office

Memphis District Office
1407 Union Avenue, Suite 621
Memphis, TN 38104
(901) 722-2617

Charge No: 250-92-0644

James N. Rivers
1333 Snowden
Memphis, Tennessee 38107
Charging Party

and

Federal Express
4009 Airways Blvd.
Memphis, Tennessee 38116
Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

All requirements for coverage have been met. Charging Party, a Black male, alleged that Respondent denied him a promotion to full-time status and an accompanying transfer due to his race and in retaliation for his having filed a prior internal EEO Complaint.

Appendix C

Charging Party, a Part-time Control Room Agent in Memphis, sought the same position in a full-time status in Oakland, California.

Respondent denied any violation of Title VII and stated that a more qualified individual was selected for the position and that the persons in the decision making loop were unaware of Charging Party's prior EEO complaint.

Record evidence indicates that Charging Party and the part-time incumbent in Oakland, a White male, were the only two (2) candidates out of 17 selected for interview. Also, evidence revealed that although the comparative was less senior to Charging Party in years with Respondent, he did enjoy a one (1) month positional seniority over Charging Party. Additionally, the comparative had consistently better periodic evaluations than Charging Party. Testimony, gathered during the course of the investigation, indicated that those persons making the selection were unaware of Charging Party's former (1990) internal EEO complaint.

No evidence was uncovered that would indicate that Respondent considered Charging Party's race or charge history when it reached the decision not to offer him full-time status and the accompanying transfer.

Based on the above analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

This determination and dismissal concludes the processing of this charge. This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the

Appendix C

Commission. THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE CHARGING PARTY'S RECEIPT OF THIS LETTER. Therefore, if a suit is not filed within this 90 day period, the Charging Party's right to sue will be lost.

On Behalf of the Commission:

AUG 16 1993
Date

s/ W. S. Grabon R.S.
W. S. Grabon
District Director

Enclosure: Information Sheet on Filing
Suit in Federal District Court

cc: Respondent's Attorney
Shirley M. Harris
Staff Attorney
Federal Express
Box 727
Memphis, Tennessee 38194-1842